Petition

81-932
No.

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In The

Supreme Court of the United States

October Term, 1981

LOUIS C. OSTRER, SEYMOUR GREENFIELD, and RITA OSTRER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITON FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a timeliness requirement attaches to the operation of Section 455(a) of Title 28, which section provides for the disqualification and recusal of federal district judges?

2. Whether the decision below was so totally devoid of evidentiary support as to render the convictions unconstitutional under the Due Process Clause of the Fifth Amendment?

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No.

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LOUIS C. OSTRER, SEYMOUR GREENFIELD and RITA OSTRER,

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit was unpublished and appears in the appendix hereto.

JURISDICTION

The petitioners Louis C. Ostrer, Seymour Greenfield and Rita Ostrer respectfully pray that a writ of certiorari issue to review a judgment and unpublished opinion of the United States Court of Appeals, for the Second Circuit entered in this proceeding on

June 18, 1981. A petition for rehearing containing a suggestion that the action be reheard in banc was denied on August 17, 1981. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. Section 455, as amended effective December 5, 1974, by Pub. L. No. 93-512, Section 1, 88 stat. 1609, provides in relevant part:

> "(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States *shall* disqualify himself in any proceeding in which his impartiality might reasonably be questioned." (Emphasis added.)

STATEMENT OF THE CASE

On July 18, 1978, petitioners were jointly indicted in the Southern District of New York for the crimes of conspiracy to evade payment of taxes and evasion of payment of taxes. Petitioners Louis C. Ostrer and Seymour Greenfield were also separately charged in the indictment with crimes arising out of transactions with the pension and welfare funds of Union Local 918. Thereafter, on March 10, 1980, petitioners went to trial before the Honorable Kevin T. Duffy. Prior to the commencement of the trial, however, Judge Duffy upon the application of the government, disqualified Michael Pollack, Esq. as trial counsel for petitioner Louis C. Ostrer.[1] Following a six week trial, the jury found petitioner Louis C. Ostrer guilty of all seven counts of the

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1. Pollack, as a former prosecutor, had investigated and/or prosecuted three of the potential trial witnesses. This disqualification was affirmed by the Court of Appeals.

indictment (conspiracy to evade payment of taxes, evasion of payment of taxes, conspiracy to embezzle, embezzlement, interstate transportation of stolen property, and racketeering). Petitioner Seymour Greenfield was only convicted of conspiracy to evade payment of taxes.[2] As a result of this conviction, petitioner Seymour Greenfield was sentenced to a term of three years' imprisonment and a fine of Ten Thousand ($10,000) Dollars. Petitioner Louis C. Ostrer was sentenced to a term of twenty years' imprisonment and a fine of Seventy Thousand ($70,000) Dollars plus the costs of the prosecution. Both petitioners are presently incarcerated. On appeal, petitioners' conviction was affirmed on February 18, 1981; a petition for rehearing was denied on April 2, 1981. A petition for a writ of certiorari was denied on October 15, 1981.

On February 26, 1981, petitioners filed the present *habeas corpus* petition arguing that the provisions of 28 U.S.C. Section 455 required Judge Duffy to have disqualified himself from presiding at the petitioners' trial. Hence, petitioners were entitled to a new trial. The petition further described the following sequence of events which included reference to a prior identical situation where Judge Duffy had disqualified himself:

> "Following the imposition of sentence on December 15, 1980, and just prior to the oral argument on the direct appeal on January 30, 1981, petitioners learned for the first time that Judge Duffy had supervised the investigation which resulted in petitioner Louis C. Ostrer's prior

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2. On March 25, 1980, petitioner Rita Ostrer entered a plea of guilty to conspiracy to violate Section 7203 of Title 26 U.S.C.A. as a misdemeanor. Thereafter, on September 3, 1980, petitioner Rita Ostrer was sentenced to a term of one year's imprisonment plus a fine of $10,000 and the costs of the prosecution; she has completed her term of imprisonment.

conviction as enumerated in footnote 3 of this petition;[3] at the time of the investigation, Judge Duffy was the Administrator of the Securities and Exchange Commission's New York Regional Office.

* * *

On January 16, 1981, pursuant to a request by Barry M. Fallick, Esq., petitioners Louis C. Ostrer and Seymour Greenfield examined certain files in the Securities and Exchange Commission's Regional office. Petitioners uncovered a litigation release for the Securities and Exchange Commission announcing petitioner Louis C. Ostrer's indictment and the indictment of numerous other individuals as enumerated in paragraph 1. The litigation release also indicates that Judge Duffy was in charge of supervising this investigation.

* * *

Petitioners Louis C. Ostrer and Rita Ostrer were served on or about July 22, 1970 with a Subpoena Duces Tecum in connection with the Belmont Franchising Corp. investigation. Moreover, petitioner Seymour Greenfield was also questioned

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3. On June 26, 1973, petitioner Louis C. Ostrer was convicted following a jury trial before Chief Judge Edelstein of eleven counts of stock fraud including violations of 15 U.S.C. Sections 77q(a), 77x, 78J(b) and 78ff, Rule 10b-5 (17 C.F.R. 240.10b-5), promulgated thereunder by the Securities and Exchange Commission, arising out of the Belmont stock swindle.

by law enforcement officials concerning his knowledge about Belmont Franchising.

* * *

In addition, petitioners also found at the Commission's Regional office, an administrative proceeding decision entitled *In the Matter of Nationwide Family Plans, Inc. William Kilroy, Louis C. Ostrer.* This decision was dated January 24, 1968.

* * *

This decision discussed in part 'Greenfield's role as Louis Ostrer's office manager and the individual who handled most of Louis C. Ostrer's insurance . . . and was concededly in charge of Louis C. Ostrer's insurance business'; (8, 10); at the time of petitioner Seymour Greenfield's sentence, Judge Duffy states (p. 28) 'Mr. Rochman, you suggest that Seymour Greenfield can do no harm to himself or to others and yet it stands out as a glaring fact that when Louis C. Ostrer went to jail the last time, the only guy who was there keeping the entire operation together was Seymour Greenfield.' This conclusion was not borne out by the evidence introduced at the trial.

* * *

At the time of petitioners' trial, sentence and taint hearing (Louis C. Ostrer only) before Judge Duffy, the Court's participation in the Belmont investigation was not disclosed by him. Judge

Duffy never explained to the petitioners and their counsel that he was well aware of petitioner Louis C. Ostrer's past criminal activity. Citations omitted.

* * *

Prior to the instant case. Judge Duffy had disqualified himself on the exact grounds as alleged herein.

* * *

On May 2, 1975, a letter was written to Judge Constance Baker Motley on Department of Justice Stationery explaining why Judge Duffy had disqualified himself from a case entitled *United States v. Bernard Deutsch, et al.*, 75 Cr. 225. In part the letter stated:

'At the arraignment on Indictment 75 Cr. 225, Judge Duffy was selected as the trial judge. He disqualified himself on the grounds that while Regional Administrator of the New York Office of the Securities and Exchange Commission, he had occasion to investigate certain matters involving Messrs. Deutsch and Duboff. The case was then reassigned to Judge Knapp.'"

Following the filing of the petition, Judge Duffy held two conferences, at which time he betrayed his awareness that a conflict of interest existed and set forth his grounds for refusing to grant the petition. At the first conference on March 9, 1981, Judge Duffy discussed his impression that he had informed Ostrer's prior counsel about his involvement with the Securities and Exchange Commission.

> "THE COURT: It is my impression, way back when, that there was a fellow by the name of Pollack in the case, that I had talked to him about the case, that I was with the SEC, and told him I just would have to be out of this one. I don't know if this is on the record, and I can't swear to it happening. I just have that kind of memory about it. Is it on the record?" (Tr. 2, 3/9/81).[4]

At the second conference on March 17, the court was informed by counsel that neither the petitioners nor their counsel knew until January 1981 about Judge Duffy's prior role in the Belmont investigation.[5] The District Court, however, denied the petition orally on the ground that he found no actual bias on his part, and that petitioners' motion was untimely:

> "THE COURT: All of which is very interesting. Everyone talks about my participation. To the best of my recollection, my participation consisted of reviewing a recommendation to the Commission and signing it. In reviewing the recommendation to the Commission, I must say I paid little or no attention to the names involved if they were not identified or identifiable with someone that I had known from some other time.[6]

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4. Refers to the minutes of March 9, 1981.

5. Refers to the minutes of March 17, 1981.

6. The litigation release described the *Belmont* investigation as being conducted under the direction of Judge Duffy. In addition, petitioners requested discovery as to the extent and nature of Judge Duffy's participation in this investigation.

Louis C. Ostrer meant absolutely nothing to me then. While I knew that he was involved in the *Belmont* thing because of his prior conviction, it still meant nothing to me.

The first time I saw him was when I saw him in connection with this case.

You know, all of these things are very nice and very neat, except you end up basically with a bottom line, and the bottom line is: Can Louis C. Ostrer, Seymour Greenfield and Rita Ostrer point to any bias on my part against them? I could truthfully say that there was none."' (Tr. 4-5, 3/17/81).

* * *

"THE COURT: Yes. I think maybe it would be an entirely different standard if this matter was brought to the attention of a presiding judge prior to the time of the trial. But here we have gone all

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7. At this point, petitioners' counsel noted that this was not the test under Section 455(a).

> "MR. FALLICK: Your Honor, I beg to differ with what your Honor thinks is the standard here.
>
> Under 455(a) there is not a claim, nor does one have to show a claim, of bias or prejudice. And we have not alleged that in that portion of the petition.
>
> It is a different standard concerning an appearance of impropriety, rather than actual bias or prejudice."

Of course, petitioner Louis C. Ostrer does not concede that there was an absence of actual bias.

> the way through the trial, your clients stand convicted. Two of them have appealed their convictions. It is all over at this point.
>
> There has got to be some more showing than just this in order to release them and set aside their convictions." (Tr. 6, 3/17/81).

The District Court also denied an application to recuse itself from deciding this petition (Tr. 7, 3/17/81).

The judgment rendered by the District Court was affirmed by the Court of Appeals. The Court of Appeals held, in short, that petitioners' argument was untimely raised. There was, however, no discussion as to the merits of the petitioners' claim.

REASONS FOR GRANTING THE WRIT

I.

The decision below conflicts with the decisions of other courts of appeals as to whether a timeliness requirement attaches to the operation of Section 455(a) of Title 28, which provides for the disqualification and recusal of federal district judges.

There is now a clear conflict in the circuits on the issue of when a motion to disqualify a judge pursuant to 28 U.S.C. Section 455(a) must be made. The conflicts extend moreover to decisions within the circuits. As parties increasingly resort to the judicial disqualification statutes, the need to establish certainty becomes more pressing — for the sake of litigants, and of the integrity of the judiciary that the disqualification statutes are intended to ensure.[8] "There is a 'need for certainty in the workaday world of conducting criminal trials.' *Ohio v. Roberts,* U.S. 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980) (Blackmun, J.). The courts of appeal have performed their assigned function, and the issue now awaits authoritative resolution by the Supreme Court." *United States v. Sutton,* 642 F. 2d 1001, 1055 (6th Cir. 1980).

Section 455(a) of Title 28 provides that:

> "(a) Any Justice, Judge, Magistrate or Referee in bankruptcy of the United States shall disqualify

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8. It should be noted that several courts have illustrated that Section 455 has received a fair amount of consideration by the courts and law review commentators. *See, e.g., State of Idaho v. Freeman,* 507 F. Supp. 706, 713 (D. Idaho, 1981); *In the Matter of Searches Conducted on 3/5/80,* 497 F. Supp. 1283, 1290 (E.D. Wisc. 1980).

himself in any proceeding in which his impartiality might reasonably be questioned.'"[9]

The Second Circuit has here held that:

> "*The argument is untimely raised.* A party seeking a new trial on the basis of newly discovered evidence must establish that the evidence could not, with the exercise of due diligence, have been discovered earlier. *United States v. Natelli*, 553 F. 2d 5 (2 Cir.), *cert. denied*, 434 U.S. 819 (1977); *United States v. Stofsky*, 527 F. 2d 237, 244 (2 Cir. 1975), *cert. denied*, 429 U.S. 819 (1976). Appellants were aware during the trial that Judge Duffy formerly had served as Administrator of the New York Regional Office of the Securities and Exchange Commission. Appellants also knew of Ostrer's prior convictions. These facts would have

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9. There are two related but dissimilar statutes governing recusal of federal district judges. 28 U.S.C. Sections 144, 455 (1976). Section 144 provides in part:

> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding."

Section 144, unlike Section 455 does stipulate a formal procedure by which it must be raised. Section 144 requires allegation by affidavit within a stringent time limit and allows a party only one such affidavit in any case. Section 455, by contrast requires no motion at all; the judge must disqualify himself if the facts cast doubt on his impartiality regardless of how or by when they are drawn to his attention. *See, e.g., Phillips v. Joint Legislative Committee, etc.*, 637 F. 2d 1014, 1019, n.6 (5th Cir. 1981), *cert. denied*, ____ U.S. ____, 101 Sup. Ct. 78 (1980).

> led an interested party who was sincerely concerned about the issue to investigate further. Appellants' failure to use reasonable diligence when they had knowledge of the essential facts and an opportunity to inquire precludes relief." (Emphasis added.)[10]

The Second Circuit's decision below is in accord with a previous decision of that court in *In re International Business Machines Corp.*, 518 F. 2d 923, 933 (2 Cir. 1981). There, the Second Circuit considered whether a timeliness requirement attached to the operation of Section 455:

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10. Here it must be noted that the doctrine of laches is not specifically applicable to motions under Section 2255. *Heflin v. United States*, 358 U.S. 415, 420 (1959). Moreover, the cases relied on by the Court of Appeals (*Natelli* and *Stofsky)* concerned motions for a new trial pursuant to Fed. R. Crim. P. 33. By contrast, this case involves a Section 2255 petition alleging both a statutory and constitutional violation.

Furthermore, the record here demonstrated that petitioners' assertions were not challenged in the court below for the failure to exercise diligence. In addition, at the time of oral argument of this appeal, petitioners' counsel respectfully suggested a remand for a short hearing on this precise issue.

In addition, it has also been held that the due diligence standard on the part of the defendant in connection with a motion for a new trial should be dispensed with when the new evidence raises constitutional issues. *Marshall v. United States*, 436 F. 2d 155, 159 n.11 (D.C. Cir. 1970). *See also, United States v. Shelton*, 588 F. 2d 1242 (9th Cir. 1978); *United States v. Hedgman*, 563 F. 2d 763, 768 (7th Cir. 1977). Finally, petitioners have contended that they should receive a new trial because Judge Duffy's bias against them deprived them of a fair trial in violation of the Due Process Clause of the Fifth Amendment. There is no doubt that the right to a fair and impartial judge who has not pre-judged a case is guaranteed by the Due Process and Fair Trial Clauses of the Constitution. *See In re Murchison*, 349 U.S. 133 (1955); *United States v. Brown*, 539 F. 2d 467 (5th Cir. 1976); *United States v. Scuito*, 531 F. 2d 842 (7th Cir. 1976). This constitutional right exists apart from the statutory disqualification provisions of Section 144 and 455. *See United States v. Scuito, supra.*

> "The court below, as we have indicated found that the motion to recuse under Sections 144 and 455 was not only legally insufficient but also untimely. Section 144 explicitly requires that the motion must be timely made. While Section 455 has no such requirement, we have without explication previously assumed that timeliness was also requisite under the amended statute. *United States v. Daley,* 564 F. 2d 645, 651 (2 Cir. 1977), *cert. denied,* 435 U.S. 933 (98 S. Ct. 1508, 55 L. Ed. 2d 530) (1978). But see *SCA Servs., Inc. v. Morgan,* 557 F. 2d 110, 117 (7 Cir. 1977). We see no reason why there should not be a timeliness requirement here even without an explicit statutory provision. See *Ex parte American Steel Barrel Co.,* 230 U.S. 35, 46 (33 S. Ct. 1007, 1011, 57 L. Ed. 1379 (1913)." (Footnote omitted.)

The Fourth and Ninth Circuit Courts of Appeals have also found a timeliness requirement in Section 455 in a manner consistent with the reading of the court below. *See, e.g.,* the Ninth Circuit's ruling in *United States v. Conforte,* 624 F. 2d 869, 879 (9th Cir. 1980), and the Fourth Circuit's ruling in *Satterfield v. Edenton — Chowan Board of Education,* 530 F. 2d 567, 574-575 (4th Cir. 1976). *See also, City of Cleveland v. Cleveland Electric Illuminating Co.,* 503 F. Supp. 368, 378-380 (N.D., Ohio, 1980) and cases cited therein holding that timeliness is a requirement of Section 455.

In addition, a panel of the Seventh Circuit Court of Appeals in *United States v. Patrick,* 542 F. 2d 381, 390 (7th Cir. 1976) has imposed a somewhat different standard "that one must raise the disqualification of the Judge at the earliest moment *after knowledge of the facts* demonstrating the basis for such disqualification." (Emphasis added.) This decision has not been followed by another

panel of the Seventh Circuit in *SCA Services, Inc. v. Morgan,* 557 F. 2d 110, 117 (7th Cir. 1977), *discussion, infra.*

The Second Circuit's holding and those of the Fourth, Seventh and Ninth Circuits are in complete conflict with those adopted by two panels of the Fifth Circuit in *Potashnick v. Port City Construction Co.,* 609 F. 2d 1101 (5th Cir. 1980), and *Phillips v. Joint Legislative Committee, etc., supra* at 1019 n.6; *cert. denied,* ____ U.S. ____, 101 S. Ct. 78 (1980); the Sixth Circuit in *Roberts v. Barlay,* 625 F. 2d 125 (6th Cir. 1980); and the Seventh Circuit in *SCA Services, Inc. v. Morgan,* 557 F. 2d 110 (7th Cir. 1977). These circuits, in construing the express language of Section 455(a) and the congressional history and intent, found no time limits within which the application must be sought.

In *SCA Services Inc. v. Morgan, supra,* a panel of the Seventh Circuit stated:

> "The provisions are mandatory; they are addressed to the judge and require that he disqualify himself in certain circumstances. They were adopted because the drafters of the statute believed 'that confidence in the impartiality of federal judges is enhanced by a more strict treatment of waiver.' They impose no duty on the parties to seek disqualification nor do they contain any time limits within which disqualification must be sought. Moreover, although the Department of Justice recommended that the new Section 455 should include some limitation of time 'to prevent applications for disqualification from being filed near the end of a trial when the underlying facts were known long before,' (H.R. Rep. No. 1453, 93d Cong., 2d Sess. 9 [1974] U.S. Code Cong. & Admin. News, 1974, p. 6358), Congress did not

> incorporate this recommendation in the statute. Because it is obvious that any decision to deny disqualification based on grounds of waiver and estoppel would frustrate the purpose of the statute, these defenses to the petition are without merit."

In *Potashnick v. Port City Construction Co., supra,* at 115, the Fifth Circuit Court of Appeals stated:

> "The express language of Section 455(e) dictates that a judge cannot accept a waiver of disqualification on Section 455(b)(5)(iii) grounds, such as when a relative of the judge has an interest which could be affected by the outcome of the proceeding. Although Section 455 places the obligation to disqualify with the judge, a litigant should not be permitted to utilize a disqualification issue as part of his trial strategy. The statute imposes, however, no duty on the parties to seek disqualification, nor any time limits within which disqualification must be sought. Although the Department of Justice recommended that Section 455 include some limitation of time 'to prevent application for disqualification from being filed near the end of a trial when the underlying facts were known long before,' Congress did not incorporate this recommendation. 1974 U.S. Code Cong. & Admin. News, pp. 6351, 6358; see *SCA Services, Inc. v. Morgan,* 557 F. 2d 110, 117 (7th Cir. 1977)."

In *Roberts v. Barlay, supra* at 125, n.8 the Sixth Circuit Court of Appeals stated:

> "Neither the text nor the legislative history of Section 455(a) contain any suggestion that the procedures of Section 144 are applicable to disqualification under Section 455(a). See H.R. Rep. No. 93-1453, 93d Cong., 2d Sess. (1974), reprinted in (1974) U.S. Code Cong. & Admin. News at 6351; C. Wright, A Miller & E. Cooper, *supra* note 3 at Section 3550; Comment, *supra* note 3, at 260. In fact, Congress disregarded suggestions that requirements such as timeliness apply to disqualification under Section 455. See generally the discussion in *SCA Services, Inc. v. Morgan*, 557 F. 2d 110, 117 (7th Cir. 1977). Section 455(a) moreover, is a product of the self-enforcing Code of Judicial Conduct, see Comment, *supra* note 3, at 236, 260."

These conflicts justify the grant of certiorari to review the judgment below.

II.

The decision below was so totally devoid of evidentiary support and thus presents substantial due process questions.

In the instant case, the petition filed in the District Court in this proceeding shows that Judge Duffy, as Regional Administrator for the Securities and Exchange Commission, directed and supervised an investigation into the affairs of the Belmont Franchising Trading Corporation which resulted in petitioner Louis C. Ostrer's prior conviction. It is also quite clear that the District Court never informed petitioners or their counsel in the instant case about its prior role in the *Belmont* investigation. In this connection, the conference minutes of March 9th, 1981 strongly suggest that Judge Duffy was apparently concerned about his prior

role because he had an incorrect impression that he had informed petitioner Louis C. Ostrer's prior counsel about his concern. More importantly, Judge Duffy in similar circumstances had disqualified himself in the past. On May 2, 1975, a letter was written to Judge Constance Baker Motley on Department of Justice stationery explaining why Judge Duffy had disqualified himself from a case entitled *United States v. Bernard Deutsch, et al.*, 75 Cir. 225. In part the letter stated:

> "At the arraignment on Indictment 75 Cr. 225, Judge Duffy was selected as the trial judge. He disqualified himself on the grounds that while Regional Administrator of the New York Office of the Securities and Exchange Commission, he had occasion to investigate certain matters involving Messrs. Deutsch and Duboff. The case was then reassigned to Judge Knapp."

Obviously, it is important in the administration of our criminal justice system to require a judge to impose a uniform policy in similar situations. *Cf., United States v. Jacobs*, 547 F. 2d 722 (2d Cir. 1976).

Thus, these facts demonstrate that Judge Duffy was in a position to be influenced by or to use information obtained during the *Belmont* investigation. Petitioners, by being unaware of the judge's prior role, had no opportunity to respond or to make the appropriate pre-trial or trial recusal applications; an application Judge Duffy was obligated to grant in light of the District Court's past practice in the *Deutsch* case. It must also be noted that Judge Duffy's prior knowledge of the petitioners was such that he surely would not have been qualified to sit as a juror in a case against petitioners.

Section 455(a) provides for recusal where the judge's impartiality might reasonably be questioned. "This section sets up an objective standard for recusal, creating the so-called appearance of Justice rule."[11] *In re International Business Machines Corp.*, 618 F. 2d 923, 929 (2d Cir. 1980). Thus, in determining whether a judge should recuse himself under Section 455(a), the issue is not whether the judge is impartial in fact, but rather, whether a reasonable man might question his impartiality under all circumstances. *United States v. Gigax*, 605 F. 2d 507, 511 (10th Cir. 1979); *United States v. Ritter*, 540 F. 2d 459 (10th Cir.), *cert. denied sub nom. Olson Farms, Inc. v. United States, et al.*, 429 U.S. 951 (1976); *Rice v. McKenzie*, 581 F. 2d 1114 (4th Cir. 1978); *SCA Services, Inc. v. Morgan*, 557 F. 2d 110 (7th Cir. 1977).

Thus, the petition filed in the District Court demonstrated a conclusive basis for a reasonable man to believe that the District Court was partial in this instance. As courts have noted, "the protection of the integrity and dignity of the judicial process from any hint or appearance of bias is the palladium of our judicial system." *United States v. Columbia Broadcasting System, Inc.*, 497 F. 2d 107, 109 (5th Cir. 1974). Any question of a judge's impartiality threatens the purity of the judicial process and its institutions. *Potashnick, supra* at p. 1111. Accordingly, the judgment below must be vacated. *Cf., United States v. Mixon*, 620 F. 2d 487 (5th Cir. 1980); *In re Murchison*, 349 U.S. 133 (1955).

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11. The legislative history of subsection (a) of Section 455 reveals that it was designed as a catch-all provision of broader scope than the combined specific disqualification provisions of subsection (b). *United States v. Conforte*, 624 F. 2d 869, 880-881 (9th Cir. 1980); *Rice v. McKenzie, supra.*

In *Potashnick, supra*, p. 1112, the Court of Appeals also stated "The use of '*might* reasonably be questioned' in section 455(a) (emphasis added) clearly mandates that it would be preferable for a judge to err on the side of caution and disqualify himself in a questionable case."

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Second Circuit Court of Appeals.

Respectfully submitted,

BARRY M. FALLICK
Attorney for Petitioners

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS DATED JUNE 18, 1981

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of June one thousand nine hundred and eighty-one.

Present:

HON. WILLIAM H. TIMBERS
HON. THOMAS J. MESKILL,
Circuit Judges,

HON. ALBERT W. COFFRIN,
District Judge,
Sitting by Designation.

FILED JUNE 18, 1981
A. Daniel Fusaro, Clerk

81-2108

LOUIS C. OSTRER, SEYMOUR GREENFIELD, RITA OSTRER,

Petitioners-Appellants,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is *affirmed.*

The three appellants before us stand convicted of the crimes of conspiracy to evade income tax and income tax evasion. Louis Ostrer and Greenfield also stand convicted of various other offenses. The convictions were affirmed by this Court on February 18, 1981. A petition for rehearing was denied on April 2, 1981.

On February 26, 1981 appellants filed the instant habeas petition urging that Judge Duffy should have disqualified himself from presiding at appellants' trial. Appellants claim that they learned for the first time in January of 1981 that Judge Duffy, as Administrator of the Securities and Exchange Commission's

New York Regional Office, had supervised the investigation which resulted in the conviction of one of appellants on eleven counts of stock fraud in 1973. Appellants also urge that Judge Duffy, as a result of the investigation, had knowledge of criminal or questionable conduct by the other convicted appellant.

At a hearing on the habeas corpus petition, Judge Duffy stated that the "bottom line" as far as he was concerned was whether appellants could point to any bias on his part against them. Judge Duffy asserted that there was no bias and added that his participation in the SEC's investigation had not enabled him to remember appellants at the time of trial.

Appellants argue that whether the trial judge was biased or not is not the question. Rather, they cite 28 U.S.C. §455(a) (1976) which provides:

> "Any justice, judge, magistrate or referee in bankruptcy of the United States *shall* disqualify himself in any proceeding in which his impartiality might reasonably be questioned." (emphasis added)

According to appellants, Judge Duffy should have disqualified himself since the circumstances of the case gave rise to an objective doubt concerning his impartiality.

The argument is untimely raised. A party seeking a new trial on the basis of newly discovered evidence must establish that the evidence could not, with the exercise of due diligence, have been discovered earlier. *United States v. Natelli,* 553 F.2d 5 (2 Cir.), *cert. denied,* 434 U.S. 819 (1977); *United States v. Stofsky,* 527 F.2d 237, 244 (2 Cir. 1975), *cert. denied,* 429 U.S. 819 (1976). Appellants were aware during the trial that Judge Duffy formerly

had served as Administrator of the New York Regional Office of the Securities and Exchange Commission. Appellants also knew of Ostrer's prior convictions. These facts would have led an interested party who was sincerely concerned about the issue to investigate further. Appellants' failure to use reasonable diligence when they had knowledge of the essential facts and an opportunity to inquire precludes relief.

s/ William H.Timbers
WILLIAM H. TIMBERS
UNITED STATES CIRCUIT JUDGE

s/ Thomas J. Meskill
THOMAS J. MESKILL
UNITED STATES CIRCUIT JUDGE

s/ Albert W. Coffrin
ALBERT W. COFFRIN
UNITED STATES DISTRICT JUDGE
Sitting by Designation

ORDER OF THE UNITED STATES COURT OF APPEALS DENYING THE PETITION FOR REHEARING DATED AUGUST 17, 1981

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 17th day of August, one thousand nine hundred and eighty-one.

FILED AUGUST 17, 1981
Daniel Fusaro, Clerk

No. 81-2018

LOUIS C. OSTRER, SEYMOUR GREENFIELD, and RITA OSTRER,

Petitioners-Appellants,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the petitioners-appellants, Louis C. Ostrer, Seymour Greenfield, and Rita Ostrer,

Order

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

s/ A. Daniel Fusaro
A. Daniel Fusaro,
Clerk

s/ Francis X. Grudhart
Chief Deputy Clerk

Opposition

FILED
FEB 1 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-932

In the Supreme Court of the United States

OCTOBER TERM, 1981

LOUIS C. OSTRER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
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In the Supreme Court of the United States

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No. 81-932

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners seek collateral relief from their convictions and sentences on the ground that the trial judge should have disqualified himself.

1. On April 23, 1980, following a six-week jury trial before Judge Duffy of the United States District Court for the Southern District of New York, petitioners Greenfield and Louis Ostrer were convicted of conspiracy to evade payment of $6.8 million of Louis Ostrer's personal income taxes, in violation of 18 U.S.C. 371. Louis Ostrer was also convicted of evasion of income taxes, in violation of 26 U.S.C. 7201; conspiracy to embezzle and embezzlement, in violation of 18 U.S.C. 371 and 664; transportation of embezzled funds, in violation of 18 U.S.C. 2314; and investing funds derived from a pattern of racketeering, in violation of 18 U.S.C. 1962(a). Louis Ostrer was sentenced to 20 years' imprisonment and a fine of $70,000, and the costs of prosecution were assessed against him; Greenfield was sentenced

to three years' imprisonment and a fine of $10,000.[1] Petitioner Rita Ostrer pleaded guilty to a misdemeanor conspiracy charge and was sentenced to one year's imprisonment, a $10,000 fine, and costs of prosecution (Pet. 2-3).

On February 26, 1981, petitioners sought collateral relief from Judge Duffy, invoking 28 U.S.C. 2241 and 2255. They contended that their convictions and sentences should be set aside because 28 U.S.C. 455(a) required Judge Duffy to disqualify himself from presiding over their trial (Pet. 3).[2] Petitioners alleged that between December 15, 1980, and January 30, 1981, they learned for the first time that Judge Duffy, who had once been the Administrator of the New York Regional Office of the Securities and Exchange Commission, " 'was in charge of supervising' " an investigation of Louis Ostrer in the early 1970's (Pet. 4). That investigation led to Ostrer's conviction in 1973 on 11 counts of securities fraud (Pet. App. 3a).

Judge Duffy held a hearing at which petitioners' attorneys, when specifically invited to represent that they did not know during the trial of Judge Duffy's association with the SEC at the time it investigated Ostrer, declined to do so, saying "[e]veryone knew that your Honor was associated with the SEC" (J.A. 52a-53a).[3] Petitioners' counsel asserted, however, that they had not known of Judge Duffy's "participation in the SEC's investigation of Mr. Ostrer" (J.A. 53a). The judge then explained (J.A. 53a-54a):

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[1]These facts are drawn from our Brief in Opposition to the petition for a writ of certiorari filed by petitioners Louis Ostrer and Greenfield in No. 80-2039, which was denied on October 5, 1981.

[2]Petitioner Rita Ostrer, who pleaded guilty, challenged only her sentence.

[3]"J.A." refers to the Joint Appendix filed in the court of appeals.

> To the best of my recollection, my participation consisted of reviewing a recommendation to the Commission and signing it. In reviewing the recommendation to the Commission, I must say I paid little or no attention to the names involved if they were not identified or identifiable with someone that I had known from some other time.
>
> Louis C. Ostrer meant absolutely nothing to me then. * * *
>
> The first time I saw him was when I saw him in connection with this case.

Judge Duffy then stated that he had no bias against petitioners (J.A. 54a), and this exchange followed (J.A. 54a-55a):

> [PETITIONER'S COUNSEL]: Under 455(a) there is not a claim, nor does one have to show a claim, of bias or prejudice. And we have not alleged that in that portion of the petition.
>
> It is a different standard concerning an appearance of impropriety, rather than actual bias or prejudice.
>
> THE COURT: Yes. I think maybe it would be an entirely different standard if this matter was brought to the attention of a presiding judge prior to the time of the trial. But here we have gone all the way through the trial, your clients stand convicted. Two of them have appealed their convictions. It is all over at this point.
>
> There has got to be some more showing than just this in order to release them and set aside their convictions.

Judge Duffy then denied petitioners' motion. The court of appeals affirmed, holding that petitioners' claim that Judge Duffy should have disqualified himself was "untimely raised" (Pet. App. 3a). The court concluded (*id.* at 3a-4a):

> Appellants were aware during the trial that Judge Duffy formerly had served as Administrator of the New York Regional Office of the Securities and Exchange Commission. Appellants also knew of Ostrer's prior convictions. These facts would have led an interested party who was sincerely concerned about the issue to investigate further. Appellants' failure to use reasonable diligence when they had knowledge of the essential facts and an opportunity to inquire precludes relief.

2. It is well established that collateral relief from a federal criminal conviction is available only for errors that are "constitutional [or] jurisdictional * * * [or] result[] in a 'complete miscarriage of justice' or in a proceeding 'inconsistent with the rudimentary demands of fair procedure.' " *United States* v. *Timmreck*, 441 U.S. 780, 783-784 (1979), quoting *Hill* v. *United States*, 368 U.S. 424, 428 (1962). Petitioners' claim that "a reasonable man might question" Judge Duffy's impartiality in the circumstances of this case, even if true, does not amount to such a fundamental violation. While 28 U.S.C. 455(a) does not contain the strict time limitation of 28 U.S.C. 144—which requires that a party move to disqualify a judge "not less than ten days before the beginning of the term at which the proceeding is to be heard"—petitioners suggest no reason to believe that Section 455 overrides settled rules governing collateral relief.[4]

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[4]Petitioners assert (Pet. 14-16) that the court of appeals' decision conflicts with the decisions in *SCA Services, Inc.* v. *Morgan*, 557 F. 2d 110 (7th Cir. 1977), *Phillips* v. *Joint Legislative Committee*, 637 F. 2d 1014 (5th Cir. 1981), *Potashnick* v. *Port City Construction Co.*, 609 F. 2d 1101 (5th Cir.), cert. denied, 449 U.S. 820 (1980), and *Roberts* v. *Bailar*, 625 F. 2d 125 (6th Cir. 1980). Not only did none of these cases involve a collateral attack on a criminal conviction, but each concerned a timely motion to disqualify; in *SCA Services and Roberts*, and apparently in *Phillips*, the motions were made before the trials began (see 557 F. 2d at 112; 625 F. 2d at 127; 637 F. 2d at 1018). The courts merely commented on the absence of a time limitation in the text of

Except for an unsupported assertion in a footnote (Pet. 12 n.10), petitioners do not even appear to contend that Judge Duffy was actually biased, or that his prior association with the SEC affected his conduct of the trial. In any event, they identify nothing in the lengthy trial suggesting such bias. In fact, at the beginning of the trial, petitioner Louis Ostrer spoke of Judge Duffy's reputation for being fair (Tr. 28); at his sentencing, petitioner Greenfield volunteered that Judge Duffy had conducted the trial without bias (6/26/80 Tr. 24).[5] Nor do petitioners suggest any basis for challenging Judge Duffy's account of his extremely limited participation in the SEC's investigation of Ostrer. In these circumstances, petitioners' claim rests solely on the fact that Judge Duffy was the Administrator of the Regional Office, and discharged the normal responsibilities of that office, at the time Ostrer was investigated—a fact that petitioners' attorneys appear to have known at all relevant times. Especially when, as the legislative history of 28 U.S.C. 455 shows, "[t]he issue of disqualification is a sensitive question of assessing all the facts and circumstances [*sic*] in order to determine whether the failure to disqualify was an abuse of sound judicial discretion" (H.R. Rep. No. 93-1453, 93d Cong., 2d Sess. 5 (1974)), there is no reason for this Court to review the court of appeals' decision that Judge Duffy properly denied relief.

Section 455 when compared to Section 144. In *Potashnick*, the court expressly did not reach the question of the effect of delay in raising a basis for disqualification (see 609 F. 2d at 1115).

[5] "Tr." refers to the trial transcript. "6/26/80 Tr." refers to the transcript of the sentencing proceeding held on June 26, 1980.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

FEBRUARY 1982

DOJ-1982-02